

Attorney Abuses of *Daubert* Hearings: Junk Science, Junk Law, or Just Plain Obstruction?

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The U.S. Supreme Court case of *Daubert v. Merrell-Dow Pharmaceuticals* focused attention on the problem of “junk science” testimony in the courtroom, a decision that led to the emergence of the *Daubert* hearing as a pre-trial screening device for determining the reliability and relevance of expert testimony. Similar to other useful legal procedural safeguards of due process, alas, the *Daubert* hearing can be misused, as well as properly used, by attorneys bent on advocacy.

*Daubert v. Merrell Dow Pharmaceuticals*¹ and its successors, so-called progeny, *General Electric v. Joiner*² and *Kumho Tire v. Carmichael*,³ theoretically represented attempts by the judiciary, among other goals, to raise the level of expert testimony available to the legal system and to decrease the perceived problem of “junk science” testimony⁴—a problem that was expected to increase as the complexity and specialization of science also increased. Junk science could be generally defined as scientific testimony based on idiosyncratic, invalid, or unreliable science, in which the methodologies used are not generally accepted by the relevant scientific community.⁵

Considered in concert with the Federal Rules of Evidence,⁶ especially rules 702 to 705, these cases as a group constitute, in one respect, an ambitious and promising attempt to define and clarify the roles of

expert witnesses, the limits and bases of expert testimony, the admissibility of the evidence on which experts rely, and similar matters. However, in practice, as attorneys and courts have become more familiar with the post-*Daubert* landscape, we have begun to see misuses as well as appropriate uses of this ruling.

Role of the Federal Rules of Evidence

Rule 702 states:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case [Ref. 6, no. 702].

This rule may be considered in part to address the consultative function of the expert to the legal system and to stress the reliability (and by implication, relevance) criteria that should underlie that opinion.

Daubert, exhaustively analyzed elsewhere (e.g., Refs. 4, 7) and not further examined herein, among other effects, turned the law’s attention to the importance of establishing the reliability (that is, repeatability) and relevance of particular expert testimony and of ensuring that the expert’s training, experience, methodology, and resultant testimony pass muster to give the court the benefit of sound opinion based on sound science and sound conclusions reached by

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sound methodologic means. While relevance of evidence has always been a matter for preliminary judicial determination, the novel aspect of *Daubert* was the use of the gatekeeping function of the trial judges in an approach designed to prevent unreliable expert testimony.⁴

Daubert Hearings

The Supreme Court decisions spawned a potentially significant procedural event in litigation: the *Daubert* hearing, a pre-trial formal review, with written opinion by the trial court judge about the suitability of the expert's proposed testimony. Forensic and legal scholars spoke informally of expert testimony's surviving (or not surviving) a *Daubert* challenge—that is, being found to meet or not to meet the criteria for admissibility under the stated constraints.

Despite the intent to achieve the laudable goals of clarity, reliability, and relevance, the fundamental *Daubert* principles—like other ostensibly useful procedural requirements—could be misused and abused, as well as appropriately applied.

Abuses and Misuses of Daubert Hearings

In the following discussion one caveat is called for: We do not suggest that hearings on reliability and relevance are inherently inappropriate. *Daubert* challenges may, in fact, reflect attorneys' confidence in their own experts' views and justified suspicion of the experts' opinions on the other side. Thus, in a best-case scenario, the challenge leads to achievement of a just and favorable outcome, obviating the expense and uncertainty inherent in a trial. Moreover, when an opposing expert is proffering innovative testimony, the ethics of practice, concerns about legal malpractice, and concerns about claims of ineffective assistance of counsel may require such a challenge.

In contrast to these valid concerns, when the attorney feels that a case is weak or that the client is unattractive to potential jurors, the attorney may want to see if the opposing expert can be "knocked out of the box" from the start by a *Daubert* challenge. While this ploy poses uncertainties of its own, the effort may be economically justifiable to the retaining attorney.

Delay

The *Daubert* hearing is not unique in being subject to abuse. Many other valuable safeguards of the

fundamental fairness of the legal system exist, such as insuring that a defendant is competent to stand trial before facing the rigors of the adversary system. Yet, in our experience in Massachusetts courts, a motion to invoke this useful safeguard can be and has been used as a delaying tactic to permit the attorneys to prepare the case more thoroughly, to set the stage for a later insanity plea, or even to foster the hope that witnesses will become less sure about recalled testimony.

Similarly, a *Daubert* hearing may be requested by one side or the other—even when the relevant science is basic, established, and non-controversial—as a comparable delaying tactic designed to secure some advantage by the delay, although, as the law evolves, such challenges to established science may become less common. In our experience, challenging the use of even absolutely standard psychological testing is a common ploy in this category.

The Dry Run

By providing a picture of the expert in action under cross-examination, expert depositions commonly serve as "dry runs" for trial preparation. However, *Daubert* hearings have the advantage of providing a second opportunity to probe the expert, as well as to obtain an otherwise unavailable assessment of the trial judge's attitudes toward the case. In those jurisdictions where depositions do not occur or are not allowed in civil or criminal cases, thus depriving attorneys of the opportunity to perform a dry run of the cross-examination of the opposing expert, a *Daubert* hearing may serve the purpose of obtaining an equally valuable advance look at the opposing experts' opinions, bases, methodology, and courtroom demeanor. The resultant data can be put to very good use by the attorney in case preparation, mastery of the relevant literature, and the like.

Impeachment: Laying a Foundation

Just as moving for an unnecessary examination for competence to stand trial may aid the attorney in laying a foundation (if only in the public's mind) for a later insanity plea, moving for an unnecessary *Daubert* hearing may lay the foundation for later efforts to impeach the expert's reasoning on scientific grounds. Even if the expert's opinion is ultimately not excluded, the knowledge gained in the process (the dry run suggested in the prior section) may be

helpful to the attorney in designing more effective cross-examination for trial.

Rattling the Expert

The motion for a *Daubert* hearing may constitute no more than an attempt at simple harassment of the experts, designed to shake their confidence in their own testimony by a threshold challenge to their approach, methodology, reasoning, and professional acceptance of the experts' theory of the case.

Fatigue Factors

In a related manner, a mid-testimony hearing may be attempted on a specious issue, to overextend the expert's time on the witness stand, perhaps interrupting the flow of case-related testimony that the jury hears. This approach may generate sufficient distraction and breach of concentration in the jury to obscure the gist and impact of the expert's testimony.

Economic War

Because a *Daubert* hearing involves costs for the time and participation of the parties and assistants (e.g., stenographers), the hearing may be requested by a large, rich firm, to drive up the costs for an opposing small, poor firm and thus to discourage or render more difficult the latter's participation in the suit.

Similarly, because of cost restrictions from the client or insurers, a law firm unable or unwilling to hire its own reputable expert may be forced to put its efforts into attempting to disqualify the other side's expert through *Daubert* challenges. Theoretically, such an approach may also serve to create a record designed to refute a later claim for legal malpractice in this situation. An attorney's specious introduction of standards for reliability and relevance (that no expert could meet) in this setting may also constitute an attempt to excuse his or her failure to retain an appropriate expert.

Shooting the Messenger

A highly unusual twist in the *Daubert* question has occurred with one of us (H.B.) when an attorney hired several experts, but one of them did not present

a favorable opinion after review. The attorney presented that expert's opinion to the other side in a distorted way that invited a *Daubert* challenge, which was feebly and ineffectively resisted by that attorney. The attorney then used the successful challenge to rationalize not paying the expert for work already done, based on the alleged failure of the opinion to meet the standard.

Conclusions

While *Daubert* challenges to expert testimony may ultimately succeed in elevating the scientific level of expert opinion presented to the jury, the pre-trial hearings may also serve less idealistic purposes, as described herein. Familiarity with the taxonomy we have outlined and anticipation and early recognition of the potential abuses noted may be among the keys to prevention. Educating the retaining attorney regarding the basis for responding to a *Daubert* challenge and being prepared oneself may successfully thwart the opposing attorney's attempted abuse. This education may involve a clinically knowledgeable literature search, outside consultation for the attorney-expert dyad, or helping the legal system distinguish between valid and pseudo-*Daubert* issues.

Finally, trial judges with their focus on gatekeeping may be misled by opposing attorneys in the manner described herein. The expert witness may assist the retaining attorney in crafting effective responses and in maintaining a critical perspective in a fallible justice system. Expert participation in continuing legal education represents another potentially beneficial, but underutilized, approach.

References

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